92-478

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

ARIZONA HISPANIC COMMUNITY FORUM,

Appellant,

v.

J. FIFE SYMINGTON, et al.,

Appellees.

Appeal From The United States District Court For The District Of Arizona

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the district court erred in finding exigent circumstances, in ordering into effect on an interim basis a legislative plan for redistricting that had been objected to by the Department of Justice, was not submitted for preclearance review prior to implementation and was subsequently the subject of a second objection by the Department of Justice, and by waiving section 5 preclearance of the plan before implementation.

LISTING OF ADDITIONAL PARTIES

APPELLANTS

Arizona Hispanic Community Forum

APPELLEES

Arizonans for Fair Representation, Inc.,
Paul Fannin,
John Mawhinney,
Stan Turley,
Hispanic Chamber of Commerce, Inc.,
Edward Valenzuela,
Richard Zazueta,
Valerie Ann Vidal,

The **San Carlos Apache Tribe,** a Federally Recognized Indian Tribe, and **Raleigh Thompson,** Chairman, and **Burnette Rope,** Vice Chairman, and as Individual Tribal Members, **Vernon Masayesva,** Chairman, **Loris Minkler** and **Wayne Taylor, Jr.,** Individual Tribal Members of the **Hopi Indian Tribe,** a Federally Recognized Indian Tribe **The Tonto Apache Tribe,** a Federally Recognized Indian Tribe, **Louise C. Lopez,** Chairman **Jeri Johnson,** Vice Chairman, and as Individual Tribal Members, **Yavapai-Apache Indian Community, Camp Verde Reservation, David Kwail,** Chairman, **Stanley Jackson,** Vice Chairman, and as Individual Tribal Members, **The Havasupal Tribe,** a Federally Recognized Indian Tribe, **Don Watahomigie,** Chairman, **Thomas Siyuja, Sr.,** Vice Chairman, and as Individual Tribal Members, **The Cocopah Indian Tribe,** a Federally Recognized Indian Tribe, **Pete Sotos, Individual Tribal Members**

LISTING OF ADDITIONAL PARTIES–Continued

J. Fife Symington, Governor of the State of Arizona

Richard D. Mahoney, Secretary of State of the State of Arizona

Arizona State House of Representatives

Arizona State Senate

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OPINIONS BELOW

The June 19, 1992, Memorandum of Decision and Order of the three judge court has not yet been officially reported. It was filed in the United States District Court for the District of Arizona in case number 92-256-PHX-SMM, and is set out in the accompanying Appendix at App. 1a.

JURISDICTION

The Order appealed from was filed June 19, 1992. Notice of Appeal to this court was filed on July 15, 1992. App. 11a. An Amended Notice was filed on July 20, 1992. App. 15a.

This court has jurisdiction under 28 U.S.C. § 1253.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The principal statutory and constitutional provision involved in this case is Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

Section 5 of the Voting Rights Act provides, in pertinent part:

> "[W]henever a State . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . such State or subdivision may institute an action in the United States District Court for the District of

> Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title. . . . Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made."

STATEMENT OF THE CASE

The State of Arizona experienced a significant population growth over the decade of the 1980's. The combined minority population of Arizona grew from 25.4% of the total population in 1980 to 28.9% in 1990. All minority populations grew at rates faster than the non-minority population. The Hispanic population alone experienced a 52% increase, and rose from 16% of the total population in 1980 to 19% in 1990. As a result of the tremendous population growth, the existing Arizona election districts for state and congressional offices were malapportioned. The Arizona state legislature undertook the process of

redistricting legislative and congressional election districts during the 1992 legislative sessions.

In the state of Arizona, one set of election district boundaries is utilized for the election of members of both state legislative houses. One senator and two House of Representative members are elected from each election district. In effect the state utilizes single member districts for the election of the state Senate and multi-member or dual member districts for the election of members to the state House of Representatives.

Of the thirty (30) members of the state Senate, five (5), or 16.67%, are Hispanic. Of the sixty (60) members of the state House, only six (6), or 10%, are Hispanic. As a result of the 1992 redistricting, at least one incumbent Hispanic state senator is not seeking reelection because of the changes in his district, reducing the Hispanic membership of the Senate to 13.33%.

This action was commenced by a non-profit group, Arizonans for Fair Redistricting, and three non-minority voters of Arizona on February 7, 1992, during the course of the legislative session and prior to any redistricting plan being adopted by the legislature. App. 1a.[1] Their complaint asked the district court to accomplish Arizona's legislative and congressional redistricting due to an asserted deadlock between the two houses of the bicameral legislature over the issue of redistricting during the session. *Id.*

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[1] Reference to the Appendix shall be noted as App. ___a.

On March 3, 1992, the district court issued a pre-trial order setting the schedule and regulating activity in the litigation setting the hearing on congressional redistricting plans submitted by parties to begin April 13, 1992. The court stayed further action on the legislative portion of the redistricting litigation because of representations by the state defendants that the legislature had passed a legislative redistricting plan that was signed by the governor on or about February 20, 1992. *Id.* That plan, Laws 1992 (5th Special Session) Chapter 1, HB 2002, (HB 2002), was subsequently sent to the Department of Justice for preclearance review under Section 5 of the Voting Rights Act. *Id.*

The court realigned two state defendants, the governor and the state House, as plaintiffs with the Arizonans for Fair Representation. The court allowed the intervention as plaintiffs of several minority parties, including Hispanics, Native Americans and Congressman Ed Pastor.

On June 10, 1992, the Department of Justice issued a letter of objection to the legislative redistricting plan, HB 2002, informing the state that the plan could not be legally enforced for the election of state senate and house of representatives members.[2] App. 21-5a. The letter cited the division of the Hispanic population in Santa Cruz County among three legislative districts and the accompanying failure of the state to create an additional district in that southeastern area of the state in which Hispanics

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[2] The Department of Justice's letter of objection dated June 10, 1992, is contained in the Appendix at App. 21a, and the second letter dated August 12, 1992, is contained in the Appendix at App. 26a.

voters would have the potential to elect representatives of their choice. App. 23a. Further, the letter found that the legislative plan's flaws were the result of the state's interest in protecting white incumbents at the expense of minority voters, thus minimizing minority voting strengths. *Id.*

On June 10, 1992, the Arizonans for Fair Representation filed a Motion for Temporary Lifting of Stay and For Emergency Interim Legislative Plan, requesting the district court order the emergency use of HB 2002, modified to correct the deficiency in Santa Cruz County cited by the Department of Justice in its letter of objection. App. 2a.

The district court scheduled a hearing on June 17, 1992, on the plaintiffs' motion. *Id.* Over the course of the intervening six days, the Arizona legislature set and held public hearings on the legislative redistricting plan. On June 16, 1992, the Arizona legislature adopted a new plan for redistricting (S.B. 1360) that was signed into law on June 16, 1992, by the governor. *Id.* That plan resulted in the move of only four precincts between two districts in the southern part of the state, increasing the Hispanic population in district 8 from 34.7% Hispanic population to 37.4% Hispanic population while reducing the Hispanic population in district 9 from 16% to 13%. App. 27a. No other changes were made to the plan, HB 2002, that had been objected to by the Department of Justice. *Id.*

The state Senate and House and the Arizonans plaintiffs filed a stipulation with the court on June 17, 1992, agreeing to the implementation of S.B. 1360 for the 1992 elections. In the June 17, 1992, hearing on oral argument, Hispanic plaintiffs opposed the stipulation and request

by Arizonans and the state, because of the failure of the plan to fully address the Section 5 objections to HB 2002 and the proposed circumvention of the preclearance process. Hispanic plaintiffs urged the court to delay issuance of any order while the state sought Section 5 preclearance of S.B. 1360, or to order the state to immediately seek preclearance of the plan. App. 6a.

The district court issued its Memorandum of Decision and Order on June 19, 1992. App. 1a. The court's June 19 order granted the motion for temporary lifting of the stay in the legislative case and the motion for emergency interim use of S.B. 1360 for 1992 elections with state legislators ordered to serve their full two year terms. App. 8a. The court also authorized the use of all precinct and polling place changes, on an interim basis, as necessary for the implementation of S.B. 1360. *Id.* Finally, the court ordered emergency interim use of Laws 1992, Fifth Special Session, Chapter 2, that had otherwise not received preclearance or been previously ordered into effect for 1992 elections by the court. *Id.*[3] In the context of its order, the court provided that the state should submit S.B. 1360 to the Department of Justice by July 31, 1992, 42 days after the order, for use of the plan in future elections. App. 9a.

On August 12, 1992, some twenty days after the state's July 23, 1992, submission of the legislative plan to the Department of Justice, the Department of Justice interposed an objection to S.B. 1360, and informed the

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[3] In its previous order of May 5, 1992, ordering a congressional plan into effect for the state of Arizona, the district court had authorized the use of Chapter 2 without preclearance to facilitate 1992 elections under the plan it had adopted.

state that the 1992 redistricting plan for the Senate and House of Representatives continued to be unenforceable. App. 26a. The letter again cited the state's failure to create another district in southern Arizona that was majority minority, and the state's continued elevation of incumbency-protection above fair recognition of minority voting strength as the reasons for the objection. App. 27-8a.

Hispanic plaintiffs filed an emergency motion for an injunction on August 19, 1992, after it became clear that the state was not responding to the letter of objection. The district court has refused to set a hearing on the matter despite repeated requests and inquiries, and denied the motion on September 9, 1992, stating it lacked jurisdiction because of this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION

For the second time in as many months, the district court below has ordered a redistricting plan for the state of Arizona that circumvents Section 5 of the Voting Rights Act, ignores minority voting rights, and threatens to undermine the enforcement of the Voting Rights Act in Arizona and throughout the south and southwest. In the first case, on May 5, 1992, the district court below, using erroneous criteria, ordered into effect a permanent plan for election of Arizona's congressmen, without any finding of exigent circumstances, without applying Section 5 mandates in its remedy, and circumventing Section 5 preclearance review requirements for that election plan. That order has been appealed by Hispanic voters, and is currently before this Court. *Hispanic Chamber of Commerce*

v. Arizonans for Fair Representation, Nos. 92-362 and 92-375 (U.S. Aug. 27, 1992).

In the instant case, following a Section 5 objection to Arizona's original plan, on June 19, 1992, the district court ordered into effect as an "interim" plan a newly legislated redistricting plan that failed to address Section 5 objections interposed to the previous plan and ordered its use for 1992 elections of Arizona Senate and House of Representative members because of exigent circumstances. The court also waived Section 5 preclearance requirements for the redistricting plan's use in 1992.

To date, the state of Arizona has managed to circumvent Section 5 preclearance requirements and the mandates of Congress and this Court under Section 5 of the Voting Rights Act for all its statewide redistricting plans. With the help of the district court, the state of Arizona has thumbed its nose at the Voting Rights Act and the important protections afforded minority voters under that Act for this election year, and probably all subsequent election years in this decade. The potential for the rulings in this case to infect other jurisdictions is great.

II. THE DISTRICT COURT ERRED BY FINDING EXIGENT CIRCUMSTANCES, BY ORDERING INTO EFFECT, ON AN INTERIM BASIS, A LEGISLATIVE PLAN FOR REDISTRICTING THAT HAD BEEN OBJECTED TO BY THE DEPARTMENT OF JUSTICE, WAS NOT SUBMITTED FOR PRECLEARANCE REVIEW PRIOR TO IMPLEMENTATION, AND WAS SUBSEQUENTLY THE SUBJECT OF A SECOND OBJECTION BY THE DEPARTMENT OF JUSTICE, AND BY WAIVING SECTION 5 PRECLEARANCE OF THE PLAN BEFORE IMPLEMENTATION FOR 1992 ELECTIONS.

The district court below ordered the legislative plan into effect because it was appropriate. App. 2a. Citing upcoming elections and the "complicated administrative procedures" in Arizona's electoral process, the court determined that exigent circumstances existed which justified the interim use of newly enacted S.B. 1360, without preclearance. *Id.* The court determined generally and without specificity or factual explanation that the upcoming deadlines and the need to avoid further delays which might lead to voter confusion or disenfranchisement required the court to choose the interim use of S.B. 1360, waiving preclearance. App. 24a.

The district court noted and rejected several remedial options including: 1) the conduct of elections under the 1982 legislative plan, 2) the delay of state legislative elections with the holding over of incumbents, and 3) the conduct of elections on an at-large basis for all 60 legislators. App. 4-5a.

The court did not consider as an option the moving of some election law deadlines to allow the state to seek

preclearance review of S.B. 1360, despite the facts that the state's filing period for candidates was still open and primary elections remained almost three months away, with the general election five months away.[4] Nor did the court consider ordering its own plan or a modified party plan into effect, with corrections of Section 5 violations, as a court ordered plan, thus exempting the plan from Section 5 preclearance requirements.

The court simply selected the plan presented through the state's stipulation in the June 17, 1992, proceeding, the newly enacted legislation, S.B. 1360, despite the failure of that plan to remedy Section 5 objections. The court did not invite any alternative plans or suggestions from other parties and did not attempt to make its own changes to the legislated plan. The court disregarded complaints that the plan failed to address the Department of Justice's objections, and then ordered Section 5 preclearance requirements for that legislated plan waived for 1992 elections. App. 6-9a. In complete contravention of *McDaniel v. Sanchez*, the district court facilitated the state's goal of avoiding more than the least possible change to its incumbent driven plan and the obstacle of Section 5 review, because the state never intended to respond to the Department of Justice's objections.

Even with the district court's imprimatur, the state's plan could not qualify as a "court decree" exception to the requirement of Section 5 preclearance before implementation.

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[4] The primary elections for the state of Arizona were conducted on September 8, 1992. The general elections are scheduled for November 3, 1992.

> "The one exception where Section 5 review would not ordinarily be available is where the court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the 'court decree' exception recognized in *Connor v. Johnson*, 402 U.S. 690 [91 S.Ct. 1760, 29 L.Ed. 2d 268] (1971) . . . Furthermore, in fashioning the plan the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." Senate Report, at 18-19.

McDaniel v. Sanchez, 452 U.S. 130, 149 (1981) (*McDaniel*).

Although allowing district courts the power to fashion interim remedies in voting rights cases, this Court has specifically determined that Congress mandated all proposals reflecting the policy choices of the elected body, no matter the constraints in choice, must meet preclearance requirements of the Voting Rights Act. *McDaniel*, 452 U.S. at 153. Regardless of the latitude given district courts in fashioning remedies, this Court has continued to require that the Congressional mandates of Section 5 remain inviolable and the one clear constraint of the remedial powers of a district court. *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096, 2105 (1991) (*Clark*). Section 5 preclearance is required, even when a federal court orders a state's election plan into effect. *McDaniel, supra.*

The district court below did not follow the clear mandates of this Court and Congress when it determined to order the legislated redistricting plan, S.B. 1360, into effect for elections without preclearance. The Arizona legislature responded to the Department of Justice's June

10, 1992, letter of objection to its legislative plan by only moving four precincts between two districts to "eliminate" the three way division of the Santa Cruz County Hispanic population. However, the plan produced by the Arizona legislature completely disregarded the Department of Justice's conjunctive and substantive objection to the state's failure to create an additional district with the population in that southern part of the state where Hispanic voters would have potential to elect representatives of their choice, because of the state's interest in protecting incumbent legislators. App. 27-8a.

Because the court found that S.B. 1360 reflected "the state's policy" and attempted "to cure the objections raised by the Department of Justice," the court found it had authority to order the interim use of the legislated plan for elections without preclearance because of "exigent" circumstances. App. 6a. The court ignored the fact that the legislative plan not only failed to cure the Section 5 objections, but actually continued the significant discriminatory feature of servicing white incumbents at the expense of minority voters and representation.

The court apparently erroneously determined that it had the power to order the legislated plan's use without compliance with Section 5 because it only ordered the plan for "interim" use. App. 2-3a. The court also mistakenly determined that its obligation to defer to legislative intent in redistricting in this instance required the court to order the use of the infirm legislative plan as a "remedial" plan, despite its failure to respond to the Section 5 violations found by the Department of Justice. App. 5-6a. Finally, the court, in contravention of almost thirty years of legal precedent, determined the *legislated*

plan should be ordered into effect for immediate implementation *without* Section 5 preclearance because of a fabricated emergency of elections in three and five months, and the court's refusal to delay any election deadlines. App. 3-4a and 9a.[5]

The district court totally misconstrued this Court's determination in *Upham v. Seamon*, 456 U.S. 37 (1982), (*Upham*) that elections may be conducted under apportionment plans "that do not in all respects measure up to the legal requirements, even constitutional requirements," to include the conduct of elections under plans that contain Section 5 violations or have not otherwise met Section 5 preclearance requirements. *Upham*, 456 U.S. at 43. In fact, this Court approved the lower court's efforts in *Upham* remedying the Section 5 violations in the apportionment plan. The infirmities in the apportionment plan addressed by this Court in *Upham* were not Section 5 violations, but were error resulting from additional changes made by the court where there were no constitutional or statutory violations found. Section 5 violations were remedied by the district court before this Court allowed that elections might go forward under the district court's plan, despite other legal concerns.[6]

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[5] Exigent circumstances have previously been determined to exist when the candidate filing period has passed and/or been postponed and passed, and elections are literally underway or within weeks or days of commencing. *Upham v. Seamon*, 456 U.S. 37 (1982); *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982). This was not the case in Arizona.

[6] The district court also erroneously relied on *Terrazas v. Clements*, 537 F.Supp. 514 (N.D. Tex. 1982), as authority for its order that elections be held under an unprecleared legislative

Moreover, the admonishments of this Court in *Connor v. Finch*, 431 U.S. 407 (1977), that an interim remedial

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redistricting plan, that incorporates Section 5 violations, because of the "emergency" in the state electoral process. In *Terrazas*, the district court was faced with a primary election in seven weeks, had already extended the deadlines for filing of candidates, and those extended filing deadlines had passed. The court was also faced with remedying two separate legislative redistricting plans, one for the Senate with 31 districts and another for the House with 150 districts. Nonetheless, the district court held a full evidentiary hearing at which all parties were offered the opportunity to present plans and evidence. The hearing extended over several days, with presentation of witnesses and hundreds of exhibits, including complex statistical evidence on plans, voter behavior, and voter registration. The Department of Justice was invited to participate in an amicus curiae capacity. The court carefully analyzed all plans submitted for the four major metropolitan counties where the Department of Justice had interposed objections. The court adopted party plans for two counties that the court determined remedied the Section 5 objections. For the other two counties, the court specifically reviewed the potential for increase in minority representation under all party plans versus the state's plan, as well as the significant changes in election district and voting precinct boundaries occasioned by the implementation of another party's plan in the forty plus districts of those counties. The court determined to allow elections to proceed under the unprecleared portions of the state's plans in only those two counties. The Department of Justice subsequently withdrew objections to some areas. The district court's decision was not appealed.

In the instant case, the candidate filing period was still underway. The court refused to consider extending filing deadlines or any other election law deadlines. Primary elections were three months away, and general elections five months away. There was one legislative plan under consideration that contained only thirty districts. The court did not conduct an evidentiary hearing or allow for submission of other plans. A

reapportionment plan must reconcile the requirements of the Constitution with the goals of state political policy was directed to the limitations of a district court's equitable powers. This Court prohibited district courts from going beyond the remedy of found constitutional or statutory violations to the replacement of otherwise legitimate state policy. This Court *did not* determine that a court should defer to state policy in lieu of remedying illegalities found in a reapportionment plan.

While a district court cannot go beyond the violations found in a reapportionment plan in fashioning a remedy and must defer to state policy where no violations are found, a district court *must* exercise its remedial powers to address those violations. *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). The exercise of that remedial power *must* implement "the mandate of Section 5 in the most equitable and practicable manner with the least offense to its provisions." *Clark*, 500 U.S. ___, 111 S.Ct. at 2105.

Clearly, the remedial powers of an equity court do not include the actions taken by the district court below of ordering into effect a legislated plan that contains features found to be discriminatory with regard to minority voters under Section 5, and waiving the preclearance requirements for that unenforceable plan, particularly when elections are months away. The district court failed to exercise its equitable powers to remedy the Section 5 violations in Arizona's legislated plan. The court took no

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second letter of objection has issued to the plan that was adopted by the court. This case is being appealed.

evidence and weighed no equities, but determined an emergency existed. Then the court proceeded to completely offend the mandates of Section 5 by ordering the state's infirm plan into effect without Section 5 review.

Section 5 of the Voting Rights Act has been considered by this Court of such significance as a public policy and importance as a tool in the eradication of racial and ethnic discrimination in voting that it has consistently and vigorously enforced the provisions of the Act since its inception. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 121 (1978) (*Sheffield*). Over the thirty years of the Act's existence, this Court has refused to allow the erosion or the compromise of the Section 5 mandates intended by Congress.

To prevent circumvention of constitutional policy of this country, Congress adopted Section 5 under which a covered jurisdiction's election procedures are frozen until it affirmatively demonstrates to a federal instrumentality that the desired change to those procedures will not discriminate against minority voters. *Sheffield*, 435 U.S. at 121. "[T]he advantage of time and inertia are shifted from the perpetrators of the evil to its victims," under Section 5. *Id.* Accordingly, under Section 5 of the Voting Rights Act, this Court has determined that the effect of an objection by the Department of Justice, when there is no declaratory judgment from the United States District Court for the District of Columbia, is to preclude the jurisdiction from holding elections. *Holt v. City of Richmond*, 406 U.S. 903, 903 (1972). (*Holt*) No new voting practices or procedures or changes to voting practices or procedures may be enforced unless "the State or political

subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object." *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977). Unprecleared changes "are not now and will not be effective as law until and unless precleared pursuant to Section 5." *Connor v. Waller*, 421 U.S. 656, 656 (1975)

This Court and individual Justices have held that elections should not go forward pursuant to unprecleared voting changes, and have granted injunctions to prevent such elections. *See, e.g., Lucas v. Townsend*, 486 U.S. 1301 (1988); *Canady v. Lumberton County Board of Education*, 454 U.S. 957 (1981); *Holt*, 406 U.S. at 903.

The Court has repeatedly reversed three-judge courts that have failed to properly apply or to comply with the mandates of Section 5 of the Voting Rights Act. *See, e.g., NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Blanding v. DuBose*, 454 U.S. 393 (1982); *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977); *Connor v. Waller*, 421 U.S. 656 (1975).

The U.S. Attorney General objected to Arizona's legislative redistricting plan, HB 2002. The legislature enacted a "new" redistricting plan (S.B. 1360) that made minimal, cosmetic changes in response to the Department of Justice's objections, but did nothing to cure the Section 5 objection to the state's failure to create a majority minority district in southern Arizona because of its interest in protecting white incumbents. The district court did not cure the Section 5 objections when it ordered the new

legislated plan into effect for 1992 elections. Moreover, the court, against this Court's mandates, ordered the 1992 elections be conducted under S.B. 1360 without compliance with Section 5 preclearance requirements and without a true emergency.

The Arizona legislature did not address minority voting rights the first *or* the second time it acted on legislative redistricting. The district court below, for the second time in this round of Arizona redistricting, ignored minority voting rights and aided the state's circumvention of Section 5 of the Voting Rights Act.

If the Arizona legislature does not act to redistrict within the decade, the district court's ordered plan which is now the subject of a second letter of objection, if allowed by this Court to stand, will remain in effect. From what has transpired in the state to date, it is clear that inaction (or ineffective action) for the Arizona legislature (as with most other legislatures) is easier to accomplish than action. Incumbent protection concerns will be as strong tomorrow as they are today. Thus, the state of Arizona will be able to circumvent Section 5 mandates and minority voting rights concerns in its legislative election plan for the duration of the decade. In fact, to date, the state of Arizona has managed to completely disregard Section 5 and minority voting rights in all its redistricting activity.

CONCLUSION

THE DISTRICT COURT ERRED AND THE DECISION BELOW MUST BE REVERSED.

What has occurred with regard to Arizona's legislative redistricting, like what occurred with the state's congressional redistricting, will become a blueprint for jurisdictions throughout the south and southwest, seeking to circumvent Section 5 and consideration of minority voting rights in redistricting. Jurisdictions, like Arizona, will not act or will not act in good faith, will delay action in legislative forums or before the Department of Justice until an "emergency" exists, or will create an "emergency" by blocking legislation. The result of allowing courts to continue sanctioning this circumvention by jurisdictions will be the statute's effective repeal.[7] The assault on the statute is already underway.

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[7] In fact similar situations to the Arizona legislative circumstance have arisen in Houston, Texas, with regard to city council elections where because of the jurisdiction's delay, a single judge court ordered the use of a plan subject to Section 5 objections, and a three judge court has refused to order new elections. *United States v. City of Houston*, Nos. 91-3076 and 91-3117 (S.D. Tex. Aug. 21, 1992). The Fifth Circuit has authorized single judge courts to order plans that have been objected to into effect where no precleared plan exists. *Campos v. City of Houston*, ___ F.2d ___, 1992 WL 180267 (5th Cir. 1992) (opinion on rehearing).

A three judge district court in Texas has recently declined to enjoin elections under a plan for county commissioner elections that is the subject of a Section 5 objection, and has in fact dismissed the Section 5 action with prejudice because of plaintiff's laches. *Lopez v. Hale County, Texas*, No. 5-92-CV-0078-C (N.D. Tex. Sept. 1, 1992) The court determined there is no

This frustration of the Voting Rights Act must stop now. It is not only contrary to public policy, it greatly offends public policy.

For the reasons stated, Appellants respectfully request this Court summarily reverse the district court order or, alternatively, note probable jurisdiction and hear this appeal on an expedited basis.

Dated: September 14, 1992

Respectfully submitted,

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Forum, et al.

"right" to remedy under Section 5 of the Voting Rights Act, and that the plaintiff bears the burden of calling the jurisdiction's attention to the fact that it has no preclearance before the electoral process begins. *Id.* Three other cases are pending against counties in the same area, all having similar facts, and similar rulings are expected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ARIZONANS FOR FAIR REPRESENTATION, et al., Plaintiffs, vs. J. FIFE SYMINGTON, et al., Defendants.	No. CIV 92-256-PHX-SMM **MEMORANDUM OF DECISION AND ORDER** (Filed June 19, 1992)

On February 7, 1992, Plaintiffs, Arizonans For Fair Representation, Inc., filed this action asking the Court to order state and congressional redistricting plans. On or about February 20, 1992, the Arizona Governor signed a state legislative redistricting plan passed by both houses of the state legislature. Laws 1992 (5th Special Session) Chapter 1, HB 2002 ("Bill 2002"). The state legislative plan was sent to the Department of Justice for pre-clearance. At the request of the parties, this Court stayed all action concerning the state legislative redistricting plan.

On June 10, 1992, the Department of Justice objected to a portion of Bill 2002. In particular, the Department of Justice found that dividing the Hispanic community in Santa Cruz County into three legislative districts minimized the Hispanic community's voting strength. The Department of Justice's letter states: "We are aware that alternative plans were rejected which would have avoided this fragmentation and more fairly recognized this concentration of Hispanic voters by dividing them

between two districts, thereby creating an additional district in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice." (Pl's. Mot. to Lift Stay, Exh. A).

After receipt of the Department of Justice's objections, Plaintiffs, Arizonans for Fair Representation, filed a Motion for Temporary Lifting of Stay and for Emergency Interim Legislative Plan. June 17, 1992 was the date scheduled for the Plaintiffs' motion to lift the stay. Subsequent to Plaintiffs filing their motion to lift the stay, the Arizona State Legislature passed S.B. 1360, a legislative redistricting plan which attempted to cure the objections raised by the Department of Justice on June 10, 1992. The Governor signed S.B. 1360 on June 16, 1992, the same date it was passed by the legislature.

At the hearing on June 17, 1992, this court[1] heard arguments to determine if the stay in the legislative case should be lifted and interim use of S.B. 1360 should be ordered for the 1992 elections. The Court finds that interim use of S.B. 1360 is appropriate. Due to the upcoming elections and the complicated administrative procedures involved in Arizona's elections, exigent circumstances justify the interim use of S.B. 1360 for the 1992 state legislative elections.

Interim use of a plan is necessitated by the "proximity of a forthcoming election and the mechanics and complexities of the state's election laws." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *Terrazas v. Clements*, 537 F. Supp.

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[1] The three judge panel was reconvened for the purpose of the hearing.

514, 537 (N.D. Tex. 1982); *see also, Upham v. Seamon*, 456 U.S. 37, 43 (1982) (recognizing that district courts have authority to order or to permit elections to be held that "do not in all respects measure up to the legal requirements, even constitutional requirements."). As the Supreme Court in *Upham* acknowledged: "Necessity has been the motivating factor in these situations." *Upham*, 456 U.S. at 44. Arizona's primary election is September 8, 1992.

Arizona law has complicated and technical procedures which must be completed before the primary and general elections. For example, in order to determine the eligibility of candidates, boundary lines must be established. *See* A.R.S. § 16-314. The last day individuals may file their partisan candidate nominating petitions is June 25, 1992. *See* A.R.S. §§ 16-311, 16-314. All matters pertaining to candidate qualification must be resolved before ballots can be printed. *See* A.R.S. §§ 16-314, 16-351. July 2, 1992 is the last day for filing challenges to nomination petitions. *See* A.R.S. § 16-351. July 13, 1992 is the last day for Superior Court to hear and render decisions on petition challenges. *See* A.R.S. § 16-351. July 20, 1992 is the last day a party may file a notice of appeal to the Supreme Court. *See* A.R.S. § 16-351. July 21-31, 1992 is the period available for the Arizona Supreme Court to hear appeals and render decisions on petition challenges. *See* A.R.S. § 16-351. August 6, 1992 is the date on which absentee balloting begins. *See* A.R.S. § 16-545. By law, the absentee and regular ballots must be identical. A.R.S. § 16-545(A). Therefore, the ballots must be printed and available for absentee voting on August 6, 1992. *See* A.R.S. §§ 16-542, 16-545. Thus, Arizona's elections

involve numerous administrative tasks which must be completed prior to the primary and general elections. Given these deadlines and to avoid further delays which may disenfranchise or confuse voters, the Court chooses to order the interim use of S.B. 1360 for the 1992 state legislative elections.

The Court finds that ordering interim use of S.B. 1360 is preferable to all other options. First, the Court declines to order the use of the 1982 legislative redistricting plan. Since 1980, Arizona has undergone a 35% increase in population.[2] As a result, current district boundaries are seriously malapportioned. S.B. 1360 conforms with the constitutional requirement of population equality. Furthermore, the precinct boundaries have been redrawn so that they no longer conform to the 1982 legislative district.

Second, the Court refuses to delay the state legislative elections until a permanent plan has been precleared by the Department of Justice. Delaying the state legislative elections would be unfair to Arizona voters, increase voter confusion and increase the cost of the elections to the state. Continuing the current legislature until a permanent plan has been precleared is equally unacceptable. A significant number of state legislators have announced that they no longer wish to serve as legislators and will not seek re-election in 1992. A continuation of the current legislature would further confuse the voters and increase the cost of the elections.

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[2] Decennial Census of Population and Housing, 1990, Publ. L. 94-171 (1991).

Third, the Court finds that ordering at-large elections is inappropriate. There are ninety members of the Arizona Legislature. "[T]he prospect of electing 90 legislators at large was deemed so repugnant as to be justified only if the legislature's failure to enact a valid plan had been deliberate and inexcusable." *Ely v. Klahr*, 403 U.S. 108, 113 (1971). In the instant case, the legislature has enacted a plan. Courts should be sensitive to the goals of state policy. *Upham*, 456 U.S. at 43. "When fashioning a temporary plan, a district court should not preempt the legislative task nor 'intrude upon state policy any more than necessary.' " *Terrazas*, 537 F. Supp. at 528 (quoting, *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). Consequently, the Court holds that at-large elections are inappropriate due to the number of state legislative seats and the state's policy reflected in S.B. 1360.

S.B. 1360 reflects the state's policy and attempts to cure the objections raised by the Department of Justice. By adjusting Hispanic Majority precincts from District 9 to District 8, the three way division of the Hispanic population in Santa Cruz County is eliminated. As a result, two districts are created. The Department of Justice's letter of June 10, 1992 states that the Department would view two districts more favorably than the three districts originally proposed in Santa Cruz county. While this Court makes no determination on the constitutionality of S.B. 1360, or the validity of S.B. 1360 under the Voting Rights Act, the Court does find that interim use of S.B. 1360 is warranted given the forthcoming election and Arizona's complicated provisions necessary for administrating elections. *Upham*, 456 U.S. at 43; *Terrazas*, 537 F. Supp. at 514.

During the hearing, the Indian Intervenors and the Hispanic Intervenors raised objections to the interim use of S.B. 1360. The Indian Intervenors object to S.B. 1360 because it divides the Hopi Reservation located in the northern part of Arizona. The Hopis raised their concerns to the Department of Justice. However, the June 10, 1992 letter from the Department of Justice fails to mention any objection concerning the Hopi Reservation. During the hearing, Assistant Attorney General Lisa Hauser stated that the Department of Justice made inquiries regarding the Hopi Reservation, but no official objection has ever been made by the Department of Justice. While the Court is sensitive to the Hopi's concerns, the Court does not have sufficient evidence to decide this issue for ruling on the motion to lift the stay and order interim use of S.B. 1360. As previously stated, the Court makes no comment on the constitutionality of S.B. 1360 or its compliance with the Voting Rights Act.

The Hispanic Intervenors object to S.B. 1360 arguing that it does not cure the objections raised by the Department of Justice. The Hispanic Intervenors also dispute this Court's authority to order the interim use of S.B. 1360 for the 1992 statewide elections. As previously mentioned, the Court finds that it has authority to order interim use of S.B. 1360 for the 1992 legislative elections without preclearance by the Department of Justice. *Upham*, 456 U.S. at 43. As enacted, S.B. 1360 eliminates the three way division of the Hispanic community in Santa Cruz County. This modification attempts to address the overall objections raised by the Department of Justice. When considering the interim use of a plan, a district court must make "an appropriate conciliation between

the requirements of the Constitution and the goals of state policy. . . . " *Id.* While this Court makes no ruling on the constitutionality of S.B. 1360 or its validity under the Voting Rights Act, the Court does find that S.B. 1360 is an attempt to cure the objections raised by the Department of Justice. Given the current and immediate deadlines of the State of Arizona in carrying out the 1992 elections and the modifications passed by the legislature in response to the Department of Justice's objections, the Court overrules the Hispanic Intervenors' objections and orders interim use of S.B. 1360 only for the use of the 1992 state legislative elections. The Court does not adopt S.B. 1360 as the permanent plan and specifically refuses to comment on the constitutionality of S.B. 1360 or its compliance with the Voting Rights Act.

Last, the Court denies the motion to intervene filed by Robin Barker, Roy Mejia and Frank Mejia. The Court received this motion shortly before the hearing on the motion to lift the stay. Pursuant to Rule 24(a)(2), Federal Rule of Civil Procedure, a party may intervene as of right if that party (1) moves to do so in a timely fashion; (2) asserts an interest in the subject of the litigation; (3) shows that its interest would be impeded or impaired if the litigation goes forth without intervention; and (4) shows the interest is not adequately represented by the parties in the litigation. *Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1991).

If the proposed intervenor fails to establish criteria warranting intervention as a matter of right, a court may allow permissive intervention under Rule 24(b)(2). Permissive intervention is appropriate if the intervenor (1)

moves for intervention in a timely manner; (2) has questions of law or fact in common with the main case; and (3) shows and [sic] independent grounds for jurisdiction. *Id.*

The Court finds that the proposed intervenors' motion is untimely. The proposed intervenors have failed to show that their interests will not be adequately protected by the current parties to the lawsuit. Therefore, the Court denies intervention.

IT IS THEREFORE ORDERED that:

(1) The motion for a temporary lift of the stay in the legislative case is granted;

(2) the motion for emergency interim use of S.B. 1360 is granted for the 1992 state legislative elections. Both the primary and general state legislative elections of 1992 shall be conducted in accordance with S.B. 1360. State legislators elected pursuant to the interim use of S.B. 1360 shall serve for the full two-year term beginning in January, 1993;

(3) the Court authorizes emergency interim use of Laws 1992, Fifth Special Session, Chapter 2, that otherwise has not been precleared or previously ordered by the Court to be used for the 1992 elections;

(4) the Court authorizes interim use of any precinct boundary changes necessary to implement the interim use of S.B. 1360 for the 1992 primary general elections. The precinct and polling place changes still are subject to section 5 review by the Department of Justice even though the Court authorizes their emergency interim use. 28 C.F.R. § 51.18(b), (c);

(5) although preclearance by the Department of Justice is not required for the interim use of S.B. 1360 for the 1992 elections, the legislative parties are directed to submit S.B. 1360 to the Department of Justice for preclearance no later than July 31, 1992 for S.B. 1360's use in future elections;

(6) the stipulation to permit interim use of S.B. 1360 is denied because it was not signed by all parties to the lawsuit;

(7) the motion for intervention filed by Robin Barker, Roy Mejia and Frank Mejia is denied;

(8) Lisa Hauser, Assistant Arizona State Attorney General, served as special counsel to the Court on Arizona election laws and procedures for the purpose of implementing S.B. 1360 for the 1992 primary and general elections. As special advisor to the Court, Ms. Hauser is prohibited from discussing any aspect of her consultation with the Court. However, nothing in this order shall prevent Ms. Hauser from carrying out her respective duties or representation of her clients;

(8) the Court retains jurisdiction over the redistricting of the state legislative districts until further order of the Court.

DATED this 19th day of June, 1992.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

/s/ Alfredo C. Marquez
Alfredo C. Marquez
United States District Judge

/s/ Charles E. Wiggins
Charles E. Wiggins
United States Circuit Judge

Copies to all counsel of record

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ARIZONANS FOR FAIR REPRESENTATION, INC., an Arizona non-profit corporation; PAUL FANNIN; JOHN MAWHINNEY; STAN TURLEY;	§	No.: CIV 92-0256 PHX SMM
Plaintiffs,	§	
ED PASTOR,	§	NOTICE OF APPEAL (Filed July 15, 1992)
Plaintiff-Intervenor,	§	
v.	§	
J. FIFE SYMINGON, governor of the State of Arizona; RICHARD A. MAHONEY, Secretary of State of the State of Arizona; ARIZONA HOUSE OF REPRESENTATIVES; ARIZONA STATE SENATE;	§	
Defendants.	§	

Arizona Hispanic Community Forum, Plaintiff-Intervenors herein, hereby appeal, and give notice of their appeal, to the Supreme Court of the United States of the entirety of this Court's Order which was entered on June 19, 1992.

This appeal is taken pursuant to 28 U.S.C. §1253.

RESPECTFULLY SUBMITTED this 14th day of July, 1992.

DATED: July 14, 1992

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BY: /s/ Judith A. Sanders-Castro
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CERTIFICATE OF SERVICE

I certify that on this 14th day of July, 1992, I sent a copy of the foregoing document by U.S. mail, postage prepaid to each of the following:

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ARIZONANS FOR FAIR REPRESENTATION, INC., an Arizona non-profit corporation; PAUL FANNIN; JOHN MAWHINNEY; STAN TURLEY, Plaintiffs, ED PASTOR; HISPANIC CHAMBER OF COMMERCE INC., ARIZONA HISPANIC COMMUNITY FORUM, EDWARD VALENZUELA, RICHARD ZAZUETA, VALERIE ANN VIDAL, THE SAN CARLOS APACHE TRIBE, a Federally Recognized Indian Tribe, and RALEIGH THOMPSON, Chairman, and BURNETTE ROPE, Vice Chairman, and as Individual Tribal Members, VERNON MASAYESVA, Chairman, LORIS MINKLER and WAYNE	§	NO. CIV 92-0256 PHX SMM HISPANIC PLAINTIFFS/ INTERVENORS AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES (Filed July 20, 1992)

TAYLOR, JR., Individual Tribal Members of the Hopi Indian Tribe, a Federally Recognized Indian Tribe, THE TONTO APACHE TRIBE, a Federally Recognized Indian Tribe, LOUISE C. LOPEZ, Chairman, JERI JOHNSON, Vice Chairman, and as Individual Tribal Members, YAVAPAI-APACHE INDIAN COMMUNITY, CAMP VERDE RESERVATION, DAVID KWAIL, Chairman, STANLEY JACKSON, Vice Chairman, and as Individual Tribal Members, THE HAVASUPAI TRIBE, a Federally Recognized Indian Tribe, DON WATAHOMIGIE, Chairman, THOMAS SIYUJA, SR., Vice Chairman, and as Individual Tribal Members, THE COCOPAH INDIAN TRIBE, a Federally Recognized Indian Tribe, PETE SOTOS, Individual Tribal Member,

Plaintiffs/Intervenors,

VS.

J. FIFE SYMINGTON, Governor of the State of Arizona; RICHARD D. MAHONEY, Secretary of State of the State of Arizona; ARIZONA STATE HOUSE OF REPRESENTATIVES; ARIZONA STATE SENATE;

Defendants.

Arizona Hispanic Community Forum, Plaintiff-Intervenors herein, hereby appeal, and give notice of their appeal, to the Supreme Court of the United States of the entirety of this Court's Order which was entered on June 19, 1992.

This appeal is taken pursuant to 28 U.S.C. §1253.

RESPECTFULLY SUBMITTED this 17th day of July, 1992.

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CERTIFICATE OF SERVICE

I certify that on July 17, 1992, I sent a copy of the Hispanic Plaintiffs/Intervenors Amended Notice of Appeal to each of the following:

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JUDITH A. SANDERS-CASTRO

[SEAL]

U.S. Department of Justice
Civil Rights Division

Washington, D.C. 20530

Office of the Assistant Attorney General

JUN 10 1992

Lisa T. Hauser, Esq.
Assistant Attorney General
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Phoenix, Arizona 85007

Dear Ms. Hauser:

This refers to the 1992 redistricting for the Senate and the House of Representatives for the State of Arizona, and Chapter 2, sections 1 and 2 (1992), which amends statutory deadlines to designate county voting precinct boundaries, reclassify voter registration according to the new precincts, and count registered voters by precinct following the 1992 redistricting for the House and Senate, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received responses to our request for additional information on April 21, May 8, May 15, May 20, and May 21, 1992; supplemental information was received on June 5, 1992.

We have carefully considered the information the state has provided, as well as Census data and information and comments from other interested persons. As it applies to the redistricting process, the Voting Rights Act requires that the Attorney General determine whether the

submitting authority has sustained its burden of showing that the proposed plan is free of the proscribed discriminatory purpose or effect. In addition, the submitted plan may not be precleared if its implementation would result in a clear violation of Section 2 of the Act. In the case of a statewide redistricting such as the instant one, this examination requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in arriving at this particular plan.

In making these judgments, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., 28 C.F.R. 51.52 (a), 51.55, 51.56. For example, we cannot preclear those portions of a plan where the legislature has deferred to the interests of incumbents while refusing to accommodate the community interests shared by insular minorities. See, e.g. *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1992); *Ketchum v. Byrne*, 740 F.2d 1398, 1408-09 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). Such concerns are frequently related to the unnecessary fragmentation of minority communities. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the demographic changes which compelled the particular jurisdiction's need to redistrict (*id.*). Finally, our entire review is guided by the principle that the Act ensures fair election opportunities and does not require that any jurisdiction attempt to guarantee racial or ethnic proportional results.

With these considerations in mind, we have reviewed the legislative choices made by the State of Arizona. Demographic changes in the state during the past decade

have resulted in an overall population increase. Among minority groups, the Hispanic growth has been the most significant. The Hispanic population has grown at a rate of 56 percent, and there has been a 2.6 percentage point increase (from 16.2 to 18.8) in the Hispanic proportion of the total population from 1980 to 1990. Our analysis shows that, in large part, the Arizona House and Senate redistricting plan meets Section 5 preclearance requirements.

In the southeastern area of the state, however, the proposed configuration of district boundary lines appears to have been drawn in such a way as to minimize Hispanic voting strength. Specifically, we refer to the considerable concentration of Hispanic population in Santa Cruz County (78% Hispanic in population), which the submitted plan divides among three legislative districts (Districts 8, 9 and 11). We are aware that alternative plans were rejected which would have avoided this fragmentation and more fairly recognized this concentration of Hispanic voters by dividing them between two districts, thereby creating an additional district in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice. Insufficient nonracial explanations have been advanced for this unnecessary fragmentation. While we have noted the state's explanation that the proposed districting in this area was designed to accommodate the interests of certain white incumbents, and even though incumbency protection is not in and of itself an inappropriate consideration, it may not be accomplished at the expense of minority voting potential. *Garza v. County of Los Angeles*, 918 F.2d at 771; *Ketchum v. Byrne*, 740 F.2d at 1408-09.

Therefore, in light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance. Accordingly on behalf of the Attorney General, I must object to the 1992 redistricting plan for the Arizona State Senate and House of Representatives to the extent that it incorporates the proposed configurations for the area discussed above.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed 1992 Senate and House redistricting plan has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the 1992 redistricting plan for the Senate and House of Representatives continues to be legally unenforceable. *Clark v. Roemer,* 111 S. Ct. 2096 (1992); *South Carolina v. United States,* 585 F. Supp. 418 (D.D.C. 1984); 28 C.F.R. 51.10 and 51.45.

The remaining specified changes occasioned by Chapter 2 (1992) are directly related to the proposed 1992 Senate and House redistricting plan. Therefore, the Attorney General is unable to make any determination at this time with regard to the proposed amendments to statutory deadlines. See 28 C.F.R. 51.22(b) and 51.35.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State

of Arizona plans to take concerning this matter. In this regard, the Department stands ready to review any plan the legislature might adopt to remedy this objection on an expedited basis. If you have any questions, you should call Rebecca Wertz (202-514-6342), Deputy Chief of the Voting Section.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

ATTACHMENT No. 1

[SEAL]

U.S. Department of Justice
Civil Rights Division

Washington, D.C. 20530

Offices of the Assistant Attorney General

AUG 12 1992

Lisa T. Hauser, Esq.
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

Dear Ms. Hauser:

This refers to Chapter 240 (S.B. 1360) of the Second Regular Session (1992), which provides for a modified redistricting plan for the Senate and the House of Representatives for the State of Arizona, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on July 23, 1992; supplemental information was received on August 10 and 11, 1992.

We have carefully analyzed the proposed changes and the information you have provided, as well as Census data and information and comments from other interested persons. We are mindful that the voting changes you have submitted for Section 5 review are intended to remedy the concerns expressed in our June 10, 1992, objection to the proposed legislative redistricting plan for the Arizona House and Senate.

As we noted in our objection letter, two concerns prompted our conclusion that the state had failed to meet its burden of showing that the plan was not motivated, in part, by a purpose of diluting minority voting strength in southern Arizona. First, we noted that the submitted plan divided a Hispanic concentration in Santa Cruz County among three legislative districts (Districts 8, 9 and 11). Second, we noted that the state had not adequately explained the rejection of alternative plans that avoided the identified fragmentation and created three districts in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice instead of the two districts in the submitted plan.

Analysis of the plan now under review reveals that while the state appears to have addressed the fragmentation of Hispanics in Santa Cruz County, the state only increases the Hispanic share of the population in proposed District 8 by less than three percentage points (from 34.7% to 37.4%). We are aware that following the objection, minority leaders urged the state to remedy the noted fragmentation and create an additional district in southern Arizona in which minorities would comprise a majority of the population. We are also aware that there were alternative plans for this area of the state available to the legislature that would both cure the noted fragmentation and afford minorities an opportunity to elect candidates of their choice by incorporating those Hispanic areas into another district which has a minority population majority. Our analysis of the various alternatives suggests that the state's reasons for rejecting the alternative approaches are pretextual. Rather, it appears that the state has again elevated incumbency-protection

considerations above the fair recognition of minority voting strength in this area.

Therefore, in light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance. Accordingly, on behalf of the Attorney General, I must object to the proposed redistricting plan (Chapter 240 (S.B. 1360)) for the Arizona Senate and House of Representatives.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed Senate and House redistricting plan has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the 1992 redistricting plan for the Senate and House of Representatives continues to be legally unenforceable. *Clark v. Roemer,* 59 U.S.L.W. 4583 (U.S. June 3, 1992); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Arizona plans to take concerning this matter. In this regard, the Department stands ready to review any plan the legislature might adopt to remedy this objection on an expedited basis. If you have any questions, you should

call Rebecca Wertz (202-514-6342), Deputy Chief for Litigation in the Voting Section.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

FILED
OCT 5 1992
OFFICE OF THE CLERK

(2)

No. 92-478

IN THE

Supreme Court of the United States

October Term, 1992

Arizona Hispanic Community Forum,

Appellant,

v.

J. Fife Symington, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Arizona

MOTION TO AFFIRM

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the district court acted within its discretion in ordering, for emergency interim use for the 1992 elections only, a state legislative redistricting plan not yet precleared by the Department of Justice where (i) the court found exigent circumstances based on the proximity of the elections and the pre-election, administrative deadlines; (ii) the U.S. Department of Justice had found that the plan "in large part" met the preclearance requirements of Section 5 of the Voting Rights Act and the court found that the plan attempted to cure the one Section 5 objection raised by the Department of Justice; and (iii) no alternative modification to cure the objection was presented to the court.

RULE 29.1 STATEMENT

Appellee Arizonans for Fair Representation, Inc. is an Arizona non-profit corporation and has no parent or subsidiary.

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No. 92-478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARIZONA HISPANIC COMMUNITY FORUM,

Appellant,

v.

J. FIFE SYMINGTON, ET AL.,

Appellees.

On Appeal From The United States District Court For The District Of Arizona

MOTION TO AFFIRM

Appellees, the Arizona State House of Representatives, Governor J. Fife Symington, Secretary of State Richard D. Mahoney, Arizonans for Fair Representation, Inc., Paul Fannin, John Mawhinney, and Stan Turley, for the reasons detailed herein, move to affirm the judgment of the district court on the grounds that the judgment was correct and that this appeal raises no substantial questions on the merits.

In essence, this appeal challenges the district court's adoption of state legislative districts, on an emergency interim basis for the 1992 elections only, owing to the proximity of the upcoming elections, where the only alternative proposed by appellant was continued use of the unconstitutional, malapportioned districts drawn a decade ago. Even though the adopted districts indisputably enhanced minority electoral opportunities — and the other Hispanic parties to this proceeding do not join in this appeal — the appellant Hispanic Community Forum complains that the court authorized districts which were not precleared pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. This contention fails to raise any substantial question: A uniform line of cases (and the Department of Justice's own

regulations) recognize that in exigent circumstances, such as where an election is imminent, a federal court may order the use of districts that do not in all respects comply with the law. And the facts of this case show that the court below properly exercised its discretion pursuant to this principle of law because: (1) when the court implemented the interim districts, the deadline for candidates to file nomination petitions for the 1992 primary elections was only six days away (June 25, 1992); (2) the U.S. Department of Justice had concluded that "in large part, the Arizona House and Senate redistricting plan meets Section 5 preclearance requirements"; (3) the plan authorized by the court attempted to cure the only objection raised by the Department of Justice; and (4) appellant failed to present any alternative to cure the objection. Given the lack of any substantial issue of law, the decision below should be summarily affirmed.

COUNTER-STATEMENT OF THE CASE

A. The Redistricting of Arizona's State Legislative Districts Following the 1990 Census

Even before the release of the 1990 decennial census, Arizona commenced the process of drawing new state legislative districts with the establishment of a Joint Select Committee on Reapportionment and Redistricting, chaired by the President of the State Senate (the "Senate") and the Speaker of the State House of Representatives (the "House"). (Senate exh. 79) During the summer of 1991, the committee held 20 hearings throughout the State, which were followed by negotiations between the Senate and House.

On February 10, 1992, the House and Senate released a proposed legislative redistricting plan and held further public hearings on the plan on February 15, 17, and 18, 1992, which resulted in further modifications. (*Id.*)

On February 20, 1992, the House and Senate passed a state legislative redistricting plan. It was signed by Governor Symington on February 28, 1992.

In contrast to the old districts, which had become seriously malapportioned, the new plan provided for substantial equality of population among districts, as required by the Fourteenth Amendment to the U.S. Constitution. (*Id.*) Moreover, although Arizona already had 6 minority senators (5 Hispanics and one American Indian) out of 30 senatorial seats, and 12 minority House members, the plan indisputably enhanced minority electoral opportunities by creating, *inter alia*, an *additional* Hispanic population majority district (district 11) and by enhancing the Hispanic population in the other districts, except for one which nonetheless remained a majority-Hispanic population district[1]. (*Id.*)[2]

On or around March 17, the Governor submitted the state legislative districts to the U.S. Department of Justice for preclearance pursuant to Section 5 of the Voting Rights Act. Arizona is one of those states covered by Section 4(b) of the Act for which preclearance is required before the districts can be enforced. 42 U.S.C. § 1973c; 28 C.F.R. § 51.1(a) & appendix. The Governor requested expedited consideration pursuant to 28 C.F.R. § 51.34 because if the full sixty-day period permitted for preclearance was utilized, *see* 42 U.S.C. § 1973c, authorization for the new districts would come less than ten days before the first day for filing candidate nomination petitions and papers on May 26, 1992. (Senate Exh. 79). Since nomination petitions must contain the signatures of qualified voters from the district

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[1] The Hispanic population in district 10 was reduced to 53.6% to enable the Hispanic population in adjacent district 11 to be increased from 40.6% to 50.1%. (Senate exh. 79, p. S2054-2055).

[2] Appellant claims that "[a]s a result of the 1992 redistricting, at least one incumbent Hispanic state senator is not seeking election because of the changes in his district" reducing Hispanic membership in the Senate from 5 of 30 seats (or 16.6%) to 4 (or 13.33%). (Jur. State., p. 3) There is absolutely no basis in the record for this allegation. Although Senators Gutierrez and Ruiz, the state senators from districts 11 and 23, respectively, have announced their retirement, there is nothing in the record to suggest that their decision was influenced by redistricting. Indeed, the redistricting enhanced the Hispanic population in Senator Ruiz's district from 53.7% to 54.5% and significantly increased the Hispanic population in Senator Gutierrez's district from 40.5% to 50.1%. (Senate Exh. 79 at S2055).

in which the candidate seeks to run, district boundaries must be fixed sufficiently before the deadline for filing nomination petitions to give candidates, particularly lesser known challengers, time to collect the qualifying number of signatures. A.R.S. §§ 16-314, 16-322A.

On April 30, 1992 — 41 days later — the State received its first communication from the Department of Justice concerning its legislative plan, requesting further information. Further information was provided on May 7, 1992, May 14, 1992, May 19, 1992, and May 20, 1992.

B. The Department of Justice's Objection

By letter dated June 10, 1992 -- 82 days after the original preclearance submission and *after* the May 26 commencement date for filing nomination petitions — the U.S. Department of Justice advised the State that "in large part, the Arizona House and Senate redistricting plan meets Section 5 preclearance requirements," but that in one area (Santa Cruz County), Hispanic voters were improperly divided among three, rather than two districts:

> In the southeastern area of the state, however, the proposed configuration of district boundary lines appears to have been drawn in such a way as to minimize Hispanic voting strength. Specifically, we refer to the considerable concentration of Hispanic population in Santa Cruz County (78% Hispanic in population), which the submitted plan divides among three legislative districts (Districts 8, 9 and 11). We are aware that alternative plans were rejected which would have avoided this fragmentation *and more fairly recognized this concentration of Hispanic voters by dividing them between two districts, thereby creating an additional district in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice*. [Emphasis added.]

(June 10, 1992 Letter, attached to Jur. State. at 21a-25a).

Hence, the only objection raised by the Department of Justice was that the Hispanic voters in Santa Cruz County should have been divided among two, rather than three legislative districts "thereby" creating an additional district in which Hispanic voters would have the "potential" to elect representatives of their choice.

C. The District Court Proceedings

Within eight hours of receipt of the Department's June 10 letter — and with the deadline for candidates to file their nomination petitions only 15 days away on June 25, 1992, A.R.S. §§ 16-311A, 16-314 — appellees Arizonans for Fair Representation and others filed a motion in the United States District Court for the District of Arizona, requesting an order authorizing the emergency use of the enacted state districts, modified to cure the objection interposed by the Department of Justice, for the 1992 elections.

Proceedings in the district court had, in fact, been previously commenced. On February 7, 1992, appellee Arizonans for Fair Representation and three individuals had instituted an action in the district court before a three-judge court pursuant to 28 U.S.C. § 2284, requesting that the court implement both a congressional and state legislative redistricting plan in time for the 1992 elections owing to the failure of the Legislature to pass redistricting legislation. When the House and Senate enacted their bipartisan plan for state legislative districts, the district court stayed its action with respect to the state legislative districts (pending preclearance) and proceeded to trial with respect to the congressional districts. On May 5, 1992, the district court filed a judgment adopting a congressional redistricting plan which is the subject of another appeal. *See Arizona State Senate, Hispanic Chamber of Commerce, et al. v. Arizonans for Fair Representation, Nos. 92-362 and 92-375* (U.S. August 27, 1992).[3]

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[3] Appellant incorrectly claims in its Jurisdictional Statement, p. 7, that in the congressional redistricting case, the district court "ordered into effect a permanent plan for election of Arizona's congressmen, without any finding of exigent circumstances . . . ." This contention is erroneous, as is appellant's allegation

(footnote continues)

D. S.B. 1360's Cure of the Section 5 Objection

After appellees moved for an order authorizing emergency use of the enacted state legislative plan, as modified to cure the Department's objection, the Arizona State Legislature passed on June 16, 1992, S.B. 1360, a legislative redistricting plan which attempted to cure the objection, while retaining the balance of the plan approved by the Department of Justice. On June 16, 1992, the Governor signed S.B. 1360, and it was submitted to the district court.

S.B. 1360 cured the three-way split of the Hispanic population in Santa Cruz County among districts 8, 9 and 11 by transferring the Hispanic precincts in Santa Cruz County which were in district 9 into district 8, thereby placing the Hispanic population in Santa Cruz in only two districts: 8 and 11. This increased the Hispanic percentage of the population in district 8 from 34.77% to 37.4%, while maintaining district 11 at 50.1%. (Jur. State. at 27a; Senate exh. 79). District 9, which had the lowest Hispanic population (16.3%) of the three districts, was proportionately reduced.

Significantly, neither during the hearing before the district court nor during the legislative hearings on S.B. 1360, did appellant **ever** present an alternative to cure the objection. Moreover, appellant's sister organization — the Hispanic Chamber of Commerce — which was also represented by the appellant's counsel in the district court, requested only the transfer of a single Hispanic precinct from district 9 to district 8, and S.B. 1360 implemented that transfer. (See June 15, 1992 hearing before House Judiciary Committee, p. 44-45).

(footnote continued)

that as a result, the district court has ordered a redistricting plan that "circumvents" Section 5. The court's congressional plan was immediately effective, not because of exigent circumstances, but because the plan was a court plan not subject to Section 5 in accordance with this Court's ruling in *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981). See Appellee House's Motion to Affirm in Nos. 92-362, 92-375, at p. 28-29.

E. The District Court's Decision

On June 19, 1992, following a half-day hearing, the three-judge district court, in a unanimous 3-0 decision, authorized emergency interim use of S.B. 1360 for the 1992 state legislative primary and general elections, scheduled for September 8, and November 3, 1992, respectively. The court noted that the following pre-election deadlines necessary for the conduct of the September 8 primary elections were imminent and justified a finding of exigent circumstances for the following reasons:

- The last day for candidates to collect the requisite number of signatures to qualify for the ballot and to file their nomination petitions containing those signatures was June 25, 1992 (only six days away), A.R.S. §§ 16-311, 16-314, and the candidates needed to know the boundary lines of the districts for purposes of collecting the signatures of qualified voters from the district in which they were running.[4]
- The deadline for filing challenges to the nomination petitions was only five court days later, or July 2, 1992, A.R.S. § 16-351;
- The Arizona superior court had only ten days thereafter (until July 13, 1992) to both hear and render decisions on those challenges, *id.*;
- Any appeal from the superior court's decision had to be made within five days to the Arizona Supreme Court, *id.*, and its decision had to be rendered by July 31, 1992;
- Absentee balloting for the primary election was to begin in less than seven weeks on August 6, 1992, A.R.S. § 16-545, which required that the ballot pamphlets be printed by then;
- Thirty-three (33) days later, on September 8, 1992, the primary election was scheduled, and in fact, primary

[4] See also A.R.S. § 16-322A(3).

election voting actually began on August 6 when absentee balloting commenced;

- The general election was scheduled less than two months thereafter on November 3, a much shorter time than most states, limiting the time for campaigning. (Opinion at 3a).[5]

Under these circumstances, the district court found exigent circumstances by which to authorize S.B. 1360 and rejected the only available alternatives: (i) postponing the elections, (ii) using the 1982 districts, or (iii) running the State elections on an at-large basis. It rejected the option of using the old 1982 legislative districts on the grounds that, *inter alia*, they were now seriously malapportioned (Opinion at 4a) and therefore no longer constitutional. Moreover, Hispanic electoral opportunities were more limited under the 1982 legislative redistricting plan than S.B. 1360 which, *inter alia*, created an **additional** Hispanic population majority district (district 11) and increased the Hispanic population in district 20 from 18.5% to 28.2% Hispanic, in district 7 from 29.6% to 34.6%, and in district 8 from 34% to 37.4%. (*See* Senate Exh. 79 at S2031, S2053).

The court also rejected the option of delaying the state legislative elections until a permanent plan had been precleared. That would have simply prolonged the use of the less acceptable 1982 districts and entailed the expense of an additional election. The court concluded that that "would be unfair to Arizona voters, increase voter confusion and increase the cost of elections to the state." It would have also required a number of state legislators, who had announced that they no longer wished to serve, to continue to do so.[6] (Opinion at 4a).

Finally, the court rejected the option of ordering at-large elections for the 90 state legislators, given the large number of

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[5] The district court's opinion is found in the appendix to the appellant's Jurisdictional Statement. For convenience, references to the opinion will cite to the page in the Jurisdictional Statement's appendix as "Opinion at ___."

[6] In fact, 32 of the 90 legislators are not seeking reelection for a variety of reasons not relevant herein.

candidates for those 90 offices. (Opinion at 5a). Indeed, the size of such a ballot would be virtually unmanageable; the risk of voter confusion obvious.

The court found that S.B. 1360 was the superior alternative as it "reflects the state's policy and attempts to cure the objections raised by the Department of Justice" by eliminating the three-way division of the Hispanic population in Santa Cruz County:

> S.B. 1360 reflects the state's policy and attempts to cure the objections raised by the Department of Justice. By adjusting Hispanic Majority precincts from District 9 to District 8, the three way division of the Hispanic population in Santa Cruz County is eliminated. As a result, two districts are created. . . . While this Court makes no determination on the constitutionality of S.B. 1360, or the validity of S.B. 1360 under the Voting Rights Act, the Court does find that interim use of S.B. 1360 is warranted given the forthcoming election and Arizona's complicated provisions necessary for administering elections. [Citations omitted.]

(Opinion at 5a).

Significantly, the court implemented S.B. 1360 "only for the use of the 1992 state legislative elections" (Opinion at 7a); appellant errs when it claims that the court's plan "will remain in effect" if "the Arizona legislature does not act to redistrict within the decade." (Jur. State., p. 18).

F. The Department of Justice's August 12 Objection

Following the court's June 19 order — and therefore outside of the record for purposes of this appeal — the Department of Justice objected to S.B. 1360 on August 12, 1992. Appellant alleges that the court's plan was therefore "the subject of a second letter of objection" (Jur. State, p. 18), but, of course, (i) the August 12 letter was the first objection to the court-authorized plan, (ii) that subsequent objection is irrelevant to whether the court properly exercised its discretion based on the

facts known to it on June 19, and (iii) the August 12 letter did, in fact, subtly change the nature of the original objection.

Unlike the June 10 letter, which requested that Hispanic voters be divided between only two districts "*thereby* creating an additional district in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice" [emphasis added] (Jur. State., p. 23a), the August 12 letter contended that a district with "a minority population majority" should be formed:

> Analysis of the plan now under review reveals that while the state appears to have addressed the fragmentation of Hispanics in Santa Cruz County, the state only increases the Hispanic share of the population in proposed District 8 by less than three percentage points (from 34.7% to 37.4%). We are aware that following the objection, minority leaders urged the state to remedy the noted fragmentation and create an additional district in southern Arizona in which minorities would comprise a majority of the population. We are also aware that there were alternative plans for this area of the state available to the legislature that would both cure the noted fragmentation and afford minorities an opportunity to elect candidates of their choice by incorporating those Hispanic areas into another district *which has a minority population majority*. [Emphasis added.]

(August 12, 1992 letter, set forth in Jur. State. at p. 27a)[7]

The only "alternative" plan of which appellees are aware that would have created a district with a Hispanic population *majority* in district 8 was submitted to the Legislature on

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[7] Thus, appellant is incorrect to argue that the August 12 letter "again cited the state's failure to create another district in southern Arizona that was majority minority." (Jur. State., p. 7). The June 10 letter never requested a "majority" minority district, only one that gave Hispanics the "potential" to elect a representative. A 37% Hispanic population in district 8 presumably does provide that potential since district 8, as a 34% Hispanic district, already was electing a Hispanic representative. (Senate exh. 79, p. S2053).

July 20 — only **after** the court hearing and **after** the Legislature adjourned on July 1. That plan (which is outside the record) was incomplete (it only drew 10 of Arizona's 30 senate districts) and created a Hispanic majority population district in district 8 only at the expense of reducing district 11 from a Hispanic majority district to a 45% Hispanic district.[8]

G. Appellant's Appeal

Appellant filed its Notice of Appeal on July 15, 1992 — nearly 30 days after the court's June 19 order. Its Jurisdictional Statement was not filed until around September 14, 1992, nearly two months later. The other Hispanic parties to this action have not joined in this appeal by the Hispanic Community Forum.[9]

Appellant states that following its appeal it filed an emergency motion for an injunction with the district court on August 19, 1992, seeking to enjoin the use of S.B. 1360. (Jur. State., p. 7). It complains that the district court "refused to set a hearing . . . and denied the motion on September 9, 1992, stating that appellant's appeal had deprived it of jurisdiction. In fact, the district court did not "refuse" to set a hearing; appellant failed to request oral argument at the time it filed its motion, as required under Rule 11(f) of the Rules of Practice of the U.S. District Court for the District of Arizona.[10] In any event, appellant does

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[8] Two other "alternatives" — only introduced on February 19, on the eve of the passage of the original legislative redistricting plan on February 20, 1992 — did not even create a Hispanic majority district in district 8, were incomplete (one plan only drew district 8), and had the effect of reducing the Hispanic percentage in district 11, among other things.

[9] The other Hispanic parties to this proceeding are the Hispanic Chamber of Commerce, Edward Valenzuela, Richard Zazueta, and Valerie Ann Vidal (all of whom were represented by appellant's counsel in the court below) and Congressman Ed Pastor.

[10] On or about August 27, the Hispanic Forum called the court to schedule a hearing, but it still had not filed the required request for a hearing. In light of the motion's jurisdictional defect, the court concluded that a hearing was unnecessary. See district court's Memorandum of Decision and Order, filed on September 9, 1992, p. 2 n. 2.

not appeal from that order here; thus, appellant's complaint is not relevant to this appeal.

REASONS FOR SUMMARY AFFIRMANCE

With the deadline for candidate nomination petitions only six days away, the district court ordered into effect, on an emergency interim basis, a state legislative redistricting plan for the 1992 primary and general elections. The only alternative districts proposed to the court were the unconstitutional, seriously malapportioned districts drawn a decade ago which undeniably offered less minority electoral opportunities than the districts authorized by the court.

Although appellant contends that the court below could not authorize interim use of unprecleared districts, a long line of cases (and Department of Justice regulations) authorize federal courts to exercise their equitable power to order interim redistricting plans, even where they do not fully comply with the law, where exigent circumstances exist. There is thus no substantial legal question that warrants plenary review.

Moreover, the facts of this case demonstrate that the district court properly exercised its discretion under the foregoing proposition of law in ordering emergency interim use of S.B. 1360, although it had not yet been precleared, for the following reasons:

- Exigent circumstances existed, given that candidates needed to know the boundaries of the districts in which they were running, and the deadline for filing nomination petitions, containing the requisite number of signatures of voters in the district to qualify the candidate to run in the district, was only six days away.
- The court-authorized plan was undeniably superior to the 1982 districts, as it provided for substantially equally populated districts and enhanced minority electoral opportunities compared to the old districts.
- The U.S. Department of Justice acknowledged that the plan satisfied the requirements of Section 5 "in large

part," and the plan attempted to cure the one objection previously interposed by the Department of Justice.

- Appellant never submitted to the court an alternative to cure the objection.
- The court only authorized the use of these districts for the 1992 elections.

Under these circumstances, the district court's order should be summarily affirmed. Appellant's position that even under exigent circumstances, a federal court has no power to order an interim plan before it has been precleared, particularly where it is the most lawful alternative before the court, is contrary to the law and common sense.

NO SUBSTANTIAL QUESTION EXISTS AS TO THE DISTRICT COURT'S POWER TO ORDER EMERGENCY INTERIM USE OF S.B. 1360

A. Where Exigent Circumstances Exist, It Is Well Settled That A Federal Court Can Authorize, On An Interim Basis, Districts Which Are Not Fully Lawful.

On numerous occasions, this Court has ruled that "under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress," a court may authorize the use of districts, on an interim basis, which do not comply with all legal requirements, even constitutional requirements. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *Upham v. Seamon*, 456 U.S. 37, 44 (1982); *Connor v. Williams*, 404 U.S. 549, 550 (1972); *Mahon v. Howell*, 410 U.S. 315, 332, *modified*, 411 U.S. 922 (1973); *Clark v. Roemer*, 111 S.Ct. 2096, 2102 (1991).

In *Reynolds v. Sims*, 377 U.S. at 585, this Court stated the general rule that under exigent circumstances, federal courts may authorize the use of legislative apportionment plans that do not fully measure up to all legal standards:

> However, under certain circumstances, such as where an impending election is imminent and a State's

> election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.

Reynolds v. Sims, 377 U.S. at 585.

In *Reynolds*, 377 U.S. at 586, despite the unconstitutionality of Alabama's legislative districts, this Court commended the district court for acting "wisely in declining to stay the impending primary election in Alabama" (which was scheduled to be held two months after plaintiff brought a motion for a preliminary injunction, *id.* at 586), and from "properly refrain[ing] from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme," adding:

> And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. Additionally, the court below acted with proper judicial restraint, after the Alabama Legislature had failed to act effectively in remedying the constitutional deficiencies in the State's legislative apportionment scheme, in ordering its own temporary reapportionment plan into effect. *Id.* at 586.

In this case, the district court followed these legal principles by deferring to the legislature's effort to cure the objection raised by the Department of Justice on June 10 and in determining that that plan "attempts to address the overall objections raised by

the Department of Justice" (Opinion at 6a) such that it was appropriate for interim use.

In *Upham v. Seamon*, *supra*, 456 U.S. at 44, this Court again reiterated the federal courts' authority to permit elections to be held in districts which do not fully comport with the law:

> It is true that we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. [Citations omitted]. Necessity has been the motivating factor in these situations.

Upham v. Seamon, 456 U.S. at 44.

Moreover, the Department of Justice's own regulations for the administration of Section 5 of the Voting Rights Act expressly recognize that a federal court may authorize the "emergency interim use without preclearance" of a voting change. Section 51.18(c) provides:

> (c) *In emergencies.* A Federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of the practice not explicitly authorized by the court. 28 C.F.R. § 51.18(c).

The lower courts have specifically recognized the federal courts' authority to order interim use of plans that have not been precleared. In *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex.), *stay den.*, 456 U.S. 902 (1982), the district court ordered into effect a temporary redistricting plan for the 1982 elections, although portions of the plan had been subject to objection by the Department of Justice under Section 5 of the Voting Rights Act. There, various plaintiffs had filed suits in various federal courts challenging the state legislature's redistricting plans. Following the trial, the Department of Justice issued letters of objection under Section 5 of the Voting Rights Act — three months before the May 1 primaries and six days before the February 1 filing deadline for those primaries. The district court adopted a temporary plan which modified, to some extent, the

challenged legislative districts but nonetheless retained portions to which the Department of Justice had objected under Section 5. The court concluded:

> Also in an emergency, a district court may adopt as an interim measure a redistricting plan that otherwise may not comply with the stringent requirements for a permanent court ordered plan. [citations omitted] . . . We think that the same principle should be applicable to a plan as to which a Section 5 objection has been raised: in emergencies, a court should be permitted to proceed on the basis of such a plan or portions of such a plan if that is the only fair and equitable alternative to disruption of the election process. [citation omitted]

Terrazas v. Clements, 537 F. Supp. at 538.[11]

Again, in *Campos v. City of Houston*, 968 F.2d 446 (5th Cir. 1992), the Fifth Circuit ruled that "elections may be held under exigent circumstances under a plan to which the Attorney General has objected." However, in that case, the Fifth Circuit determined that where the district court "rejects, without adequate reasons, a precleared plan in favor of a legislative plan that has not been precleared, it abuses its discretion in awarding interim relief." *Id.* at 452. In *Campos*, the district court had authorized the upcoming elections to be conducted under a redistricting plan to which the Attorney General had timely objected, instead of a newly enacted plan which the Attorney General had precleared just prior to the issuance of the district court's order.

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[11] Appellant attempts to distinguish *Terrazas v. Clements*, 537 F. Supp. 514, on the grounds that (i) the district court there faced a primary election within seven weeks, (ii) the court had already extended the deadlines for filing candidate statements, and (iii) the court had offered the parties the opportunity to present plans in evidence and had invited the Department of Justice to participate. (Jur. State., pp. 13-14 n. 6). None of these points distinguishes *Terrazas*. In this case, the Department of Justice had declined to take a position at the hearing; the appellant did not submit any alternative plans to the court to cure the objection, although it was free to do so; and although the primary election was eleven weeks away, the voting for the primary election was to begin in less than seven weeks with the commencement of absentee balloting, and further, the filing deadlines were only six days away.

Since the district court's main reason for authorizing the unprecleared plan was legally insufficient — that Hispanic citizens had objected to the precleared plan — the Fifth Circuit vacated the order as an abuse of discretion.

In this case, there was no precleared plan. The district court's choice was between continued use of the existing unconstitutional districts or authorization of a newly enacted, properly apportioned set which was largely precleared and which attempted to cure the portion that was not.

Nor are any of the cases cited by appellant contrary to the uniform line of authorities cited above. Appellant cites *Clark v. Roemer*, 111 S.Ct. 2096 (1991), for the proposition that Section 5 is "the one clear constraint of [sic] the remedial powers of a district court" (Jur. State., p. 11), apparently arguing that a court has no power to authorize, on an interim basis, a plan that has not been precleared. (Jur. State., p. 15).

To the contrary, *Clark v. Roemer*, 111 S.Ct. 2096, did not address the federal court's remedial powers to order interim districts in exigent circumstances. Instead, that case arose in the context of a standard action to enjoin elections held pursuant to an enactment for which the State had failed to obtain approval under Section 5 of the Voting Rights Act. Even in that context, this Court expressly *declined* to rule that federal courts do not have the power to authorize elections for unprecleared districts:

> We need not decide today whether there are cases in which a District Court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward. An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed.

Clark v. Roemer, 111 S.Ct. at 2102.

Unlike this case, *Clark* was a case where the State had not timely sought preclearance, and the appellants sought to enjoin elections which the State was administering in violation of Section 5. In *Clark*, the appellants had alleged back in July, 1987 that

Louisiana had violated Section 5 of the Voting Rights Act by failing to submit for preclearance a number of statutory and constitutional voting changes for the election of judges. Although in September, 1988 and May, 1989, the Attorney General had objected to certain changes which were submitted to him, Louisiana waited for well over a year before asking the Attorney General in June, 1990 to reconsider his denial of preclearance and proceeded with plans to hold elections for the unprecleared seats in the fall of 1990. Under these circumstances, this Court determined that the district court had erred in permitting the elections for the unprecleared seats to go forward:

> No such exigency exists here. The State of Louisiana failed to preclear these judgeships as required by § 5. It received official notice of the defect in July 1987, and yet three years later it had still failed to file for judicial preclearance . . . . [citation omitted] It scheduled elections for the unprecleared seats in the fall of 1990 even after the Attorney General had interposed objections under § 5. In short, by the fall 1990 election, Louisiana had with consistency ignored the mandate of § 5. The District Court should have enjoined the elections.

Clark v. Roemer, 111 S.Ct. at 2102.

In contrast, in this case, Arizona timely sought preclearance. The Department of Justice's objection came only 15 days before the candidate filing deadline and 82 days after Arizona's original preclearance submission, for which, by the way, expedited consideration had been requested. When the Department found the plan largely satisfied Section 5, but objected to one portion, the Arizona Legislature attempted to cure the objection in the first instance, and the court properly deferred to that effort after finding that it eliminated the three-way division of the Hispanic population to which the Department had objected. Accordingly, the record reflected that unlike the State of Louisiana, Arizona did not simply attempt to enforce new districts without preclearance, but had requested judicial authorization for interim districts, that the court had

authorized districts approved by the Department of Justice while modifying the area to which objection was made, and that appellant had failed to offer any alternative modification. Unlike the situation in *Clark* where the issue was whether an election could proceed under districts the state has failed to preclear, a court's authorization of interim districts following a hearing protects the interests that the Voting Rights Act seeks to safeguard.

Appellant also cites three cases for the proposition that "[t]his Court and individual Justices have held that elections should not go forward pursuant to unprecleared voting changes, and have granted injunctions to prevent such elections." (Jur. State., p. 17). However, none of those cases concerned the power of a federal court to authorize the emergency use of interim districts; instead, they simply concerned applications to enjoin a state's unauthorized use of unprecleared districts in violation of Section 5 of the Voting Rights Act. In *Lucas v. Townsend*, 486 U.S. 1301 (1988), Justice Kennedy granted an application to enjoin a bond referendum election where a change in the election date (from a high turnout election date to a special election) had not been timely submitted for preclearance and preclearance had not been received prior to the election. In balancing the equities, Justice Kennedy concluded that there was a fair prospect that the lower court erred in concluding that the change in date was not covered by Section 5 and that on balance, the equities favored the applicants because any burdens imposed by the injunction "can fairly be ascribed to the respondents' own failure to seek preclearance sufficiently in advance of the date chosen for the election." *Id.* at 1305.

Again, in *Canady v. Lumberton City Board of Education*, 454 U.S. 957 (1981), the Court granted an application to enjoin the Board of Education and the Board of Elections from permitting residents of three annexed areas to vote in a school board election until appellees demonstrated that they had complied with Section 5.

Finally, in *Holt v. City of Richmond*, 406 U.S. 903 (1972), the Court granted an application to enjoin elections for the city council of the City of Richmond where an objection to the voting

changes under which they would be conducted had been interposed by the Attorney General.

Accordingly, none of these cases addressed the power of a district court to authorize interim districts; they simply addressed the right to enjoin a political subdivision's unauthorized use of unprecleared districts, which is precisely what Section 5 of the Voting Rights Act is meant to prohibit.[12]

Therefore, none of those cases are relevant to a federal court's power to order the interim use of unprecleared districts in the case of exigent circumstances. As shown herein, it is well settled that the courts have this power in the case of exigent circumstances. No substantial legal question is raised herein.

B. No Substantial Question Exists As To The Presence of Exigent Circumstances.

Owing to the "upcoming elections and the complicated administrative procedures involved in Arizona's elections," the court below found that "exigent circumstances" existed which justified the interim use of S.B. 1360 for the 1992 state legislative elections. (Opinion at 2a).

This finding was amply justified in the record, as demonstrated in the court's opinion. First, the last day for candidates to file nomination petitions containing sufficient signatures to qualify for the ballot was only six days away on June 25, 1992. *See* A.R.S. Sections 16-311, 16-314. (Opinion at 3a).

Second, there was only a limited time thereafter to allow challenges to nomination petitions and to resolve those challenges: The deadline for filing challenges to candidate nomination petitions was only five court days away (or by July 2, 1992), *see* A.R.S. Section 16-351; the superior court only had ten days thereafter, or until July 13, to hear *and* render decisions on the petition challenges, *see id.*; a party only had five days thereafter

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[12] Appellant also cites several cases for the proposition that the Court "has repeatedly reversed three-judge courts that have failed to properly apply or to comply with the mandates of Section 5. . . ." (Jur. State., p. 17). That, of course, proves nothing more than where a lower court errs, this Court will reverse.

within which to file a notice of appeal to the State Supreme Court, whose opinion had to be rendered by July 31, *id.*; and within six days, or by August 6, 1992, absentee balloting had to begin, *see* A.R.S. Section 16-545, which meant that the ballots had to be printed and available for absentee voting by August 6, 1992. With significant numbers of Arizona voters stationed overseas with the military, the 33-day period for absentee balloting could not have been reduced materially without disenfranchising voters, and by law, the absentee and regular ballots must be identical. A.R.S. Section 16-545(A). (*See* Opinion at 3a).

While acknowledging that exigent circumstances have been determined to exist when candidate filing periods have passed (Jur. State., p. 13 n. 5), appellant argues that the court "fabricated" an emergency because the primary elections were three months away (actually they were only 11 weeks away). (Jur. State., p. 13). However, as noted, the deadline for gathering signatures for candidates' nomination petitions ran in six days, little different from the situation in *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982), where the Department of Justice had objected to the districts only six days before the filing deadline for the May 1 primaries (which were 3 months away). Further, postponement of the deadline for candidate nomination petitions would have seriously truncated the period for campaigning for the September 8 primary elections, a result which would have benefited incumbents as against challengers (including minorities) who do not have the advantages of name recognition for purposes of fund raising and voter support. Additionally, postponing the deadline would have further reduced the 33 days available for absentee balloting, thereby disenfranchising some voters.

Appellant also argues that the "court did not consider as an option the moving of some election law deadlines to allow the state to seek preclearance review of S.B. 1360" (Jur. State., pp. 9-10); however, postponement of election law deadlines meant postponing the state legislative elections. Specifically, by the time the Department of Justice had assessed whether S.B. 1360 satisfied Section 5 (in this case August 12), it would have been too late to hold the September 8 primary elections — less

than 30 days later — under any other plan. Indeed, absentee voting would have already begun. Even if an adverse preclearance decision had been made a month earlier, there would have been insufficient time prior to the primary election to redraw new districts *and* allow time for candidates to collect signatures from the new districts before absentee balloting. Moreover, separating the state legislative elections from the federal elections, including the Presidential election, would have affected voter turnout for the state legislative elections, which could have adversely affected minority voters. *Cf. Lucas v. Townsend*, 486 U.S. 1301 (1988). In sum, awaiting preclearance was not practicable if the elections were to be held on schedule.

C. The Interim Districts Authorized By The District Court Largely Satisfied Section 5 And Attempted To Cure The Objection That Had Been Interposed.

Nor did the district court abuse its discretion in adopting S.B. 1360. S.B. 1360, from the standpoint of equality of population and minority electoral opportunities, was indisputably superior to the existing, concededly unconstitutional, decade-old districts. Moreover, the districts authorized by the court appeared to satisfy Section 5 concerns while at the same time reflecting state legislative policy: The Department of Justice's June 10, 1992 letter acknowledged that the redistricting plan met "in large part" Section 5 preclearance requirements (Jur. State. at 23a), and the court found that it eliminated the three-way division of the Hispanic population in Santa Cruz County about which the Department of Justice complained. (Opinion at 5a).

Although appellant contends that S.B. 1360 did not cure the objections, appellant never presented the court with a proposal to cure it.

Further, prior to the court hearing, at the legislative hearing held on June 15, 1992, at which the Legislature considered a cure for the Department of Justice's objection, the appellant's representative stated that he was "not free to give" any alternative that appellant had in mind with respect to Santa Cruz County. (6/15/92 Transcript of House Committee on Judiciary, p. 42-43). Its sister Hispanic organization, also represented by appellant's

counsel in the court below — the Arizona Hispanic Chamber of Commerce — requested only that precinct 13 in Santa Cruz County be moved from district 9 to district 8, that being the "biggest thing and the single shot" that it wished to emphasize, and that transfer was in fact implemented under S.B. 1360. *Id.* at 45.

Appellant argues that "the plan produced by the Arizona legislature completely disregarded the Department of Justice's conjunctive and substantive objection to the state's failure to create an additional district with the population in that southern part of the state where Hispanic voters would have potential to elect representatives of their choice . . . ." (Jur. State., p. 12). To the contrary, S.B. 1360 directly addressed the objection. The Department of Justice's only objection on June 10 was that the submitted plan "divides among three legislative districts" the Hispanic population in Santa Cruz County and that alternative plans "more fairly recognize this concentration of Hispanic voters by dividing them between two districts, thereby creating an additional district in the southern part of the state in which Hispanic voters would have the potential to elect representatives of their choice." (Jur. State. at 23a). That is exactly what S.B. 1360 did. It eliminated the three-way split of the Hispanic population in Santa Cruz County between districts 8, 9, and 11 by transferring the only Hispanic precincts in the county that were in district 9 to district 8; it retained district 11 as a majority Hispanic district; and it increased the Hispanic population in district 8 from 34.7% to 37.4%, by eliminating the three-way split. The Hispanic population in district 8 is at least equal to that in other state legislative districts which have elected Hispanic representatives, such as district 7 (which has elected a Hispanic senator and two Hispanic representatives with a Hispanic population of 30%), district 2 (which elected a Hispanic senator throughout the decade of the 1980's until his voluntary retirement in 1990 with a 10% Hispanic population), and district 4 (which elected a Hispanic legislator from 1973 through 1987 with only a Hispanic population of 18%). (*See* Senate Exhibit 79).

Moreover, district 8 itself has elected a Hispanic legislator at a 34% Hispanic population level. (*Id.*)[13]

Appellant also claims that the court below failed to "consider ordering its own plan or a modified party plan into effect, with corrections of Section 5 violations, as a court ordered plan . . . ." (Jur. State., p. 10). However, as appellant acknowledges elsewhere (Jur. State., p. 15), a district court must honor the policies and preferences of the state as reflected in its enacted redistricting legislation, except where "necessary to cure any constitutional or statutory defect." *Upham v. Seamon*, 456 U.S. 37, 43 (1982); *White v. Weiser*, 412 U.S. 783, 795-797 (1973). The district court did just that by adopting a plan which maintained the enacted districts that satisfied Section 5 and which attempted to cure the Section 5 objection.

Accordingly, appellant's contention that "the district court facilitated the state's goal of avoiding more than the least possible change to its incumbent driven plan" (Jur. State., p. 10) has absolutely no basis in the record: The district court was obligated to follow all lawful portions of the State's plan. It did. It further adopted a plan that attempted to cure the Department of Justice's objection, and appellant failed to present any alternative cure.

CONCLUSION

For all these reasons, appellees submit that none of the issues raised by appellant merits plenary review by this Court. Appellant's position that the district court had no authority to authorize emergency interim use of unprecleared districts is contrary to a uniform line of cases and the Department of Justice's own regulations. Moreover, the facts of this case demonstrate that the legislative districts authorized by the district court were superior to the alternatives presented to it, that they largely met

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[13] Accordingly, appellant's contention that "the State never intended to respond to the Department of Justice's objection" has no basis whatsoever in the record. The State Legislature held hearings to cure the objection, and appellant never presented any alternative to it during those hearings.

the requirements of Section 5 and attempted to cure the one Section 5 objection that was interposed, and that appellant never presented an alternative to cure the objection. The district court's judgment should be summarily affirmed.

DATED: October 14, 1992

Respectfully submitted,

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No. 92-478

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

ARIZONA HISPANIC COMMUNITY FORUM,

Appellant,

v.

J. FIFE SYMINGTON, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MOTION OF THE ARIZONA STATE SENATE TO DISMISS OR AFFIRM

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BEST AVAILABLE COPY

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MOTION OF THE ARIZONA STATE SENATE TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, appellee the Arizona State Senate moves to dismiss or affirm the appeal filed on behalf of the Arizona Hispanic Community Forum. The motion is grounded on the fact that the order under review is a special order of the three-judge district court permitting the 1992 Arizona legislative election to go forward on the basis of a district plan adopted by the Arizona Legislature which had not yet been considered by the Department of Justice. The district court fairly concluded that in

view of the lateness of the date (June 1992), it was necessary and appropriate to accept the legislative plan so that the 1992 election could go forward; and, no stay having been sought in this Court, it is surely too late to deal with this matter now.[1]

This Court has jurisdiction under 28 U.S.C. § 1253 and the substantive statute is Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

REASONS FOR DISMISSING OR AFFIRMING THE APPEAL

This appeal should be dismissed or affirmed. The order under challenge on this appeal is carefully restricted to the November 3, 1992 election. That election will have occurred before this Court could reasonably take any action on this appeal. It is familiar doctrine that where the challenge to a redistricting plan comes too late in terms of the election cycle, the election may go forward. *Ely v. Klahr*, 403 U.S. 108, 91 S. Ct. 1803, 29 L. Ed. 2d 352 (1971), a virtually identical Arizona situation of 20 years ago; *Upham v. Seamon*, 456 U.S. 37, 102 S. Ct. 1518, 71 L. Ed. 2d 725 (1982); and *Terrazas v. Clements*, 456 U.S. 902, 102 S. Ct. 1745, 72 L. Ed. 2d 158 (1982).

We do not disparage the substantiality of the underlying problem that the Department of Justice has not approved the legislative redistricting plan passed by the Arizona Legislature. But at

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[1] Two separate matters arose from the three-judge district court's action. Because the Arizona Legislature had not adopted a congressional reapportionment plan, this Court ordered a reapportionment. The congressional matter has been appealed here, Nos. 92-362 and 92-375, matters scheduled for the October 30 conference of this Court. The Legislature did adopt a legislative redistricting plan and it is that matter which gives rise to the instant case.

this late date, those problems can only be resolved in terms of the 1994 and subsequent elections. All the order appealed from did was to provide that on an emergency basis the 1992 election could be conducted under the legislative plan adopted. On the facts and under the controlling authority, this appeal as to the 1992 election (all that is before the Court) should either be dismissed as moot or affirmed because of the want of a substantial federal question. The jurisdiction of the district court will revive when the matters identified in the footnote are disposed of.

Respectfully submitted,

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October, 1992